

HONORABLE JAMES L. ROBART

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CORUS REALTY HOLDINGS, INC.,

Plaintiff,

v.

ZILLOW GROUP, INC.; ZILLOW,
INC.; and TRULIA, LLC,

Defendants.

Case No. 2:18-cv-00847-JLR

**AGREEMENT REGARDING
DISCOVERY OF
ELECTRONICALLY STORED
INFORMATION AND
~~PROPOSED~~ ORDER**

NOTE ON MOTION CALENDAR:
December 4, 2018

JLR

The parties hereby stipulate to the following provisions regarding the discovery of electronically stored information ("ESI") in this matter:

A. General Principles

1. An attorney's zealous representation of a client is not compromised by conducting discovery in a cooperative manner. The failure of counsel or the parties to litigation to cooperate in facilitating and reasonably limiting discovery requests and responses raises litigation costs and contributes to the risk of sanctions.

2. The proportionality standard set forth in Fed. R. Civ. P. 26(b)(1) must be applied in each case when formulating a discovery plan. To further the application of the proportionality standard in discovery, requests for production of ESI and related responses should be reasonably targeted, clear, and as specific as possible.

1 3. The purpose of this order is to reduce the discovery burden on the parties by
2 limiting and focusing the review of large collections of electronically stored information (e.g.,
3 email, hard drives, mobile devices) that are likely to contain discoverable information. The ESI
4 discovery procedure is not intended to be the only source of documents produced in this litigation
5 and should not be used to avoid the production of requested documents from readily available
6 sources without significant burden. For example, the parties expect to make requests for financial
7 information, product specifications, marketing and customer information, documents used to
8 support the responding parties claims, and source code; however, a party cannot avoid production
9 of such readily identifiable documents simply because they are not assigned to a particular
10 custodian or do not contain a search term.

11 **B. ESI Disclosures**

12 Within 30 days after the Court enters this order, or at a later time if agreed to by the
13 parties, each party shall disclose:

14 1. Custodians. The five custodians most likely to have discoverable ESI in their
15 possession, custody or control. The custodians shall be identified by name, title, connection to the
16 instant litigation, and the type of the information under his/her control.

17 2. Non-custodial Data Sources. A list of non-custodial data sources (e.g. shared
18 drives, servers, etc.), if any, likely to contain discoverable ESI.

19 3. Third-Party Data Sources. A list of third-party data sources, if any, likely
20 to contain discoverable ESI (e.g. third-party email and/or mobile device providers, “cloud”
21 storage, etc.) and, for each such source, the extent to which a party is (or is not) able to preserve
22 information stored in the third-party data source.

23 4. Inaccessible Data. A list of data sources, if any, likely to contain discoverable
24 ESI (by type, date, custodian, electronic system or other criteria sufficient to specifically
25 identify the data source) that a party asserts is not reasonably accessible under Fed. R. Civ.
26 P. 26(b)(2)(B).

1 **C. Preservation of ESI**

2 The parties acknowledge that they have a common law obligation to take reasonable and
3 proportional steps to preserve discoverable information in the party's possession, custody or
4 control. With respect to preservation of ESI, the parties agree as follows:

5 1. Absent a showing of good cause by the requesting party, the parties shall not
6 be required to modify the procedures used by them in the ordinary course of business to back-
7 up and archive data; provided, however, that the parties shall preserve all discoverable ESI in
8 their possession, custody or control.

9 2. All parties shall supplement their disclosures in accordance with Rule 26(e)
10 with discoverable ESI responsive to a particular discovery request or mandatory disclosure
11 where that data is created after a disclosure or response is made (unless excluded under (C)(3)
12 or (D)(1)-(2) below).

13 3. Absent a showing of good cause by the requesting party, the following categories
14 of ESI need not be preserved:

- 15 a. Deleted, slack, fragmented, or other data only accessible by forensics.
- 16 b. Random access memory (RAM), temporary files, or other ephemeral data
17 that are difficult to preserve without disabling the operating system.
- 18 c. On-line access data such as temporary internet files, history, cache, cookies, and
19 the like.
- 20 d. Data in metadata fields that are frequently updated automatically, such as last-
21 opened dates (see also Section (E)(5)).
- 22 e. Back-up data that are substantially duplicative of data that are more accessible
23 elsewhere.
- 24 f. Server, system or network logs.
- 25 g. Data remaining from systems no longer in use that is unintelligible on the systems
26 in use.
- 27 h. Electronic data (e.g. email, calendars, contact data, and notes) sent to or from
28 mobile devices (e.g., iPhone, iPad, Android, and Blackberry devices), provided
29 that a copy of all such electronic data is routinely saved elsewhere (such as on a
30 server, laptop, desktop computer, or "cloud" storage).
- 31 i. Instant messaging, text messaging, SMS communications, telephonic recordings,

1 or voicemail.

2 j. System or executable files (.exe, .dll, etc.)
3 k. Any other file types subsequently agree to by the parties in writing.

4 **D. Privilege**

5 1. With respect to privileged or work-product information generated after the filing
of the complaint, parties are not required to include any such information in privilege logs.

6 2. Activities undertaken in compliance with the duty to preserve information are
7 protected from disclosure and discovery under Fed. R. Civ. P. 26(b)(3)(A) and (B).

8 3. Information produced in discovery that is protected as privileged or work product
9 shall be immediately returned to the producing party, and its production shall not constitute a
10 waiver of such protection, if: (i) such information appears on its face to have been inadvertently
11 produced or (ii) the producing party provides notice within 15 days of discovery by the producing
12 party of the inadvertent production.

13 4. Within a reasonable time after a production, the producing party shall provide a
14 privilege log of all withheld discovery. Fields will include: Bates number range, if any, date,
15 author/sender, recipients, cc'd recipients, subject matter, and privilege bases.

16 5. Testifying experts shall not be subject to discovery on any draft of their reports in
17 this action and such draft reports, notes, or outlines for draft reports are also exempt from
18 production and discovery pursuant to Fed. R. Civ. P. 26(b)(4)(C) and (D). Materials,
19 communications, and other information exempt from discovery under this paragraph shall be
20 treated as attorney work product for the purposes of this action.

21 **E. ESI Discovery Procedures**

22 1. On-site inspection of electronic media. Such an inspection shall not be permitted
23 absent a demonstration by the requesting party of specific need and good cause or by agreement
24 of the parties.

25 2. Search methodology. The parties shall timely attempt to reach agreement on

1 appropriate search terms, or an appropriate computer- or technology-aided methodology, before
2 any such effort is undertaken. The parties shall continue to cooperate in revising the
3 appropriateness of the search terms or computer- or technology-aided methodology.

4 In the absence of agreement on appropriate search terms, or an appropriate computer- or
5 technology-aided methodology, the following procedures shall apply:

6 a. A producing party shall disclose the search terms or queries, if any, and
7 methodology that it proposes to use to locate ESI likely to contain discoverable information within
8 20 days of responding to the requesting party's document request. The parties shall meet and
9 confer to attempt to reach an agreement on the producing party's search terms and/or other
10 methodology within 10 days of the disclosure of the producing party's search terms or queries.

11 b. If search terms or queries are used to locate ESI likely to contain
12 discoverable information, a requesting party is entitled to no more than 5 additional terms or
13 queries to be used in connection with further electronic searches absent a showing of good cause
14 or agreement of the parties. The 5 additional terms or queries, if any, must be provided by the
15 requesting party within 30 days of receipt of the producing party's production.

16 c. Focused terms and queries should be employed; broad terms or queries,
17 such as product and company names, generally should be avoided. Absent a showing of good
18 cause, each search term or query returning more than 250 megabytes of data are presumed to be
19 overbroad, excluding Microsoft PowerPoint files, image and audio files, and similarly large file
20 types.

21 d. The producing party shall search both non-custodial data sources and ESI
22 maintained by the custodians identified above.

23 3. Format. The parties agree that ESI will be produced to the requesting party with
24 searchable text, in a format to be decided between the parties. Acceptable formats include, but are
25 not limited to, native files, multi-page TIFFs (with a companion OCR or extracted text file),
26 single-page TIFFs (only with load files for e-discovery software that includes metadata fields

1 identifying natural document breaks and also includes companion OCR and/or extracted text
2 files), and searchable PDF. Unless otherwise agreed to by the parties, files that are not easily
3 converted to image format, such as spreadsheet, database and drawing files, should be produced
4 in native format.

5 4. De-duplication. The parties may de-duplicate their ESI production across
6 custodial and non-custodial data sources after disclosure to the requesting party.

7 5. Metadata fields. The parties agree that only the following metadata fields need be
8 produced: beginning/ending Bates numbering; confidentiality designations; document type;
9 custodian/source and duplicate custodians/sources; author/from; recipient/to, cc and bcc;
10 title/subject; file name and size; original file path; original date and time created, sent, modified
11 and/or received; attachment/parent/child identification; and hash value.

DATED: December 4, 2018

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CORUS REALTY HOLDINGS, INC.

ZILLOW GROUP, INC.; ZILLOW, INC.; and
TRULIA, LLC

Bv: s/ *Dario Machleidt*

By: s/ Stevan Stark (w/ permission)

ORDER

2 Based on the foregoing, IT IS SO ORDERED.

3 DATED: 5 December 2018


The Honorable James L. Robart
UNITED STATES DISTRICT JUDGE

The Honorable James L. Robart
UNITED STATES DISTRICT JUDGE